Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

APPELLANTS' RESPONSE TO THE "REPLY BRIEF" OF APPELLEES CALL AND SHEDD ON THE ISSUE OF MOOTNESS

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A. Appellees CALL and Shedd have made improper and erroneous assertions to this Court in their "Reply Brief".

This is a brief response to the inaccurate and unseemly aspersions published in the "Reply Brief of Appellee CALL to Appellants' Brief on the Issue of Mootness".

Appellee's first-assertion in that brief is that: "I. The appellant is misdirecting this Court in an effort to make a case for mootness." Appellees advise the Court that: "The allegation by the appellant contained in the 'Appellant's Brief on the Issue of Mootness', that the appellee CALL has concurred in the position of the appellees Graf and Comerford regarding the implementation of the 1974 charter rather than the 1972 charter is utterly groundless."

In response, we call the Court's attention to the following facts:

1. On May 20, 1975—in connection with appellants' motion to the District Court for a stay of enforcement of its January 9, 1975 judgment pending this appeal—the attorneys for the plaintiffs-appellees wrote to each member of the three-judge panel stating in part as follows:

• • •

> The plaintiffs do not object to the action of the New York Secretary of State and the County of Niagara to implement the 1974 Niagara County Charter. The decision is a voluntary implementation of the declaration of the right of suffrage of the voters of Niagara County by this Court and is consistent with it.
>
> • • •
>
> The action of the New York Secretary of State and the County of Niagara pertaining to the 1974 charter should not be stayed by this Court since neither that charter nor the action of the state and local government officials pertaining thereto is within the purview of this suit."

Thus, on May 20, 1975, appellees expressly concurred in the actions being taken by the State and County officials in implementing the purported 1974 charter.

2. On June 2, 1975, at the time of oral argument of appellants' motion to the District Court to vacate the judgment of January 9, 1975 on the ground that the proceeding had become moot, the same counsel for appellees had the following to say concerning the position of those parties with reference to proceeding with elections pursuant to the purported 1974 charter:

> Mr. Phelan: • • • "The action of the Niagara County officials in putting the 1974 Charter on the ballot is in full compliance but not in specific authorization by this Court and – – –"
>
> The Court: "That wasn't your action anyway. That was the action of the County."
>
> Mr. Phelan: "That was the action of the County, that's right. Now, our position, the position in the letter I filed on the motion for the stay was that the action of the Secretary of State and the State of New York in certifying the '74 Charter; the action of the County in going ahead with it is completely consistent. • • •
>
> Now, Mr.,—the fact that the County Attorney and the officials of the County have not specifically asked this Court for permission to go ahead in that way consistent with,—I say consistent with the order and judgment of this Court, Mr. Fuzak is attempting, good lawyer that he is, to take advantage of it on the theory and try to work himself within some of the very fine language of the Supreme Court on the mootness question and I respectfully submit that a determination on this motion should be withheld."
>
> • • •
>
> "Now, I suggest and it is our intention on behalf of the aggrieved voters who originated the action to promptly make an application to this Court for permission to have the 1974 Charter put on the ballot, not asking this Court to take jurisdiction over the 1974 Charter and to make any determination with reference to it as was originally asked of the Court, but to merely ask this Court as part of its continuing jurisdiction on the theory that the '74 Charter is virtually identical

to the '72 Charter, it is consistent with the constitutional determination of this Court and complies with and implements the basic judgment of this Court and to ask this Court for permission - - -"

The Court: "We have already decided that against the County, haven't we?"

Mr. Phelan: "You didn't decide that question. What you decided,—what the County asked between the time of decision and at the time a proposed judgment was submitted to the Court was asked the Court to make a substantive determination that the 1974 Charter and the election held under that Charter violated one man, one vote, and obviously the Court could not do that since that was not the justiciable issue that was before it, but it was just like as happened in many of the reapportionment cases, there would be one reapportionment plan before the Court and when the substantive decision has been made the Court enjoins and orders the reapportionment plan to be carried out. The Government has come back in many instances later and said, 'we want to slightly change this plan in this way and this is consistent with the Court's judgment and complies with it and carries it out'.

I think that this Court before any action is taken any way different from what this Court ordered January 9th by County officials, I think this Court ought to permit the action."

The Court: "Are you going to make a motion?"

Mr. Phelan: "Yes. I am going to make a motion promptly and point out the very slight differences between the two charters so that under no circumstances is a collateral issue of this,—of mootness,—under no circumstances will such an issue get into the Supreme Court because of the closely divided Court."

Although this statement was made to the Court on June 2, 1975, no motion has been made.

3. Despite the admission by all appellees that the State and County Officials are not enforcing and have not enforced or acted under the 1972 charter, and that the Federal Courts have not had and do not now have jurisdiction over the 1974 charter, and that the 1974 charter is being enforced and implemented rather than the 1972 charter, and that elections are proposed to be held pursuant to the 1974 charter and not the 1972 charter, counsel for appellee CALL and Shedd advised this Court by letter dated July 9, 1975, as follows:

> "The position of appellees CALL and Shedd is that there is no question of mootness to be considered by the Court because the 1972 County Charter is being enforced in accordance with the injunction of the District Court of January 9, 1975. We submit the motion to affirm the judgment of the District Court should be granted."

4. In an affidavit to the District Court sworn to on June 2, 1975, appellee Shedd made the following representations concerning the position of appellees CALL and Shedd:

> "3. That the decision of the N. Y. Secretary of State, upon the entry of the judgment of this Court on January 9, 1975, to certify both of the County Charters approved by a majority of the voters of Niagara County is consistent with said judgment and represents a compliance with the specific direction of this Court as to the 1972 Charter and a voluntary compliance as to the 1974 Charter.
>
> • • •
>
> 8. That in the interim your deponent will apply to this Court for permission to conduct the election pursuant to the 1974 County Charter on the ground that such an election is in compliance with the January 9, 1975 judgment of this Court."

No such action has been taken by appellees. On the contrary, these appellees have now filed a motion with the District Court seeking an order enjoining the County and

State officials from proceeding under or attempting to enforce the 1974 charter.

5. In a letter dated July 2, 1975 from the attorneys for the appellees CALL and Shedd to the appellee-respondent Kenneth Comerford, County Clerk of the County of Niagara (see Appendix B to Brief of Appellees CALL and Shedd on the Question of Mootness), those attorneys made the following statements and demands:

> "Therefore, we advise you that you are directed and enjoined by the judgment of the three-judge U. S. District Court to implement the 1972 County Charter unless you receive express authorization from said Court to implement the 1974 County Charter as a successor instrument of local government for Niagara County.
>
> In the event that you elect to certify to the Niagara County Board of Elections that the Office of Niagara County Executive is to be filled pursuant to the County Charter other than the one expressly authorized by the three-judge U. S. District Court, we will immediately request that the court enforce the injunctive provisions of the judgment granted January 9, 1975."

6. In Appellees' Reply Brief on the Issue of Mootness (Page 3) the following statement is made to the Court: "The only charter capable of immediate implementation is the 1972 charter."

In view of the above, counsel for the appellees CALL and Shedd certainly transgress the bounds of propriety in falsely accusing appellants of "misdirecting" this Court. The contrary is quite clearly the case. It is quite apparent that the machinations of the respondents and appellees with respect to the two proposed charters constitute an effort to deprive the appellants here from obtaining any meaningful judicial relief. In the vernacular, there is a kind of "shell game" going on with these two charters.

B. It is now apparent that there is serious question as to whether this case was ever a live controversy with adversary parties.

It now appears that all of the original parties to this case—petitioners and respondents as well—are on the same side of the question presented to the District Court for decision. All of those parties, who were presumably in adverse positions to each other when this case was initially submitted, now act in concert to uphold the judgment granted in favor of the petitioners.

It is appropriate therefore for this Court to consider whether this case is or ever was an adversary proceeding out of which the Court below received the benefits of full development and disclosure of relevant facts and meaningful adversary argument of applicable legal principles. If the case has not in fact been a true adversary proceeding, there is of course added reason for declaring mootness and vacating the judgment below. In this regard we ask the Court to consider the following facts:

a) Petitioners and all respondents now apparently openly join to urge affirmance of the judgment below although one would expect that the respondents, if truly adversary to petitioners and their position, would urge this Court to vacate the judgment below.

b) In the action as initially commenced, the named and participating respondents were the Niagara County Officials and the State of New York Officials. The Niagara County Officials were clearly supportive of petitioners' efforts, and not adversaries opposing those efforts. The Niagara County Legislature adopted the 1972 Local Law containing the proposed charter and put it to referendum.

Niagara County itself commenced the first Federal action seeking to have the 1972 charter declared valid and to have the New York State constitutional provisions and the Municipal Home Rule Law Statutory provisions ruled unconstitutional. The same Federal District Court dismissed the action. Accordingly, it is clear that the Niagara County respondents were not true adversaries to petitioners in the case now pending but indeed were and are seeking the same result as petitioners.

c) Since the January 9, 1975 judgment, the Niagara County attorney has pursued every effort to protect that judgment and to proceed with enforcement of the 1974 charter.

d) It now appears that the Attorney General of the State of New York was also not an adversary party. In this respect we cite the following:

i) Although, as noted by the District Court, this was a case of first impression, the Attorney General permitted the matter to be considered and decided by the three-judge panel on summary judgment without benefit of any factual proof establishing the governmental justification and the reasonableness of the constitutional and statutory provisions under attack. This factual information should have been presented to the Court to refute the conclusory claims made by petitioner of "invidious discrimination". The Court was thus deprived of a full record and a full disclosure and exposition of facts relevant and necessary to an informed judgment.

ii) The Attorney General initially advised representatives of various towns in the state, including towns within the County of Niagara, that the Attorney General would appeal the January 9, 1975 judgment to this Court.

However, shortly before expiration of the statutory appeal period, the Attorney General reversed that position and declared that no appeal would be processed. But for the prompt action of appellants in intervening, the January 9, 1975 judgment would have become final without any ruling by this Court on the very substantial constitutional questions raised by that judgment. This is not the action of a true adversary.

iii) New York State Officials who initially refused to certify both the 1972 charter and the 1974 charter, now purport to certify the 1974 charter, and the Attorney General resists all efforts to obtain a ruling of this Court as to the propriety of the January 9, 1975 judgment before proceeding with implementation of the 1974 charter.

iv) The Attorney General's representative made the following remarks to the District Court on May 19, 1975 concerning his present position:

> Mr. Wolfgang: "Your Honor, I am here, of course, to explain what has transpired because obviously there is a question as to the fact situation.
>
> A Charter of 1972 was ordered implemented and was received and certified by the Secretary of State. Almost simultaneously a decision was reached by the Secretary of State and the State of New York not to appeal the Court's judgment. Thereafter a Charter bearing the date 1974 was submitted for certification* and the Secretary of State took the position since the law under which he had rejected had been declared unconstitutional and we were to abide by that section,—we were no longer to abide by that section as ordered by the Court that he would accept and certify the '74 Charter, which has been done."

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* The 1972 and 1974 charters were in fact "certified" by the Secretary of State on the same day, February 28, 1975.

> The Court: "Mr. Fuzak points out and I think this is clear that this particular decision will have far reaching, much more far reaching impact than the mere County of Niagara. For example, we had in here an application from the town of,—I believe Huntington, Long Island for a stay and we have all the problems of sewer districts, the annexations and all the rest of it.
>
> What is the Secretary of State's position going to be on all these other things that come up?"
>
> Mr. Wolfgang: "That judgment has not been made as far as I know, sir."

The intervening appellants therefore respectfully submit that there is serious question as to whether this proceeding has from the outset been a true adversary proceeding, or whether it should be regarded as a "friendly" suit among the original parties to achieve the result contained in the January 9, 1975 judgment.

Recent decisions of this Court further mandate a vacatur of the January 9, 1975 judgment and a remand of the case to the District Court. See *Hill vs. Printing Industries of the Gulf Coast et al.* (June 30, 1975; No. 74-456): *Connor vs. Waller* (June 5, 1975; No. 74-1509).

Respectfully submitted,

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Attorney for Appellants, The Town of Lockport and Floyd Snyder.

August, 1975.